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IN THE

Supreme Court of the United States

October Term, 1995

GEORGE NEWMAN,

Petitioner,

vs.

CONSOLIDATION COAL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A SEAMAN INJURED BY UNSEAWORTHINESS AND JONES ACT NEGLIGENCE SHOULD BE DEPRIVED OF CUSTOMARY PREJUDGMENT INTEREST WHERE THERE IS NO FINDING OF ANY PECULIAR OR EXCEPTIONAL CIRCUMSTANCES BECAUSE THE COURT RATHER THAN THE JURY GAVE THAT REMEDY?

II. WHETHER AN INJURED SEAMAN IS COMPARATIVELY NEGLIGENT IN NOT DISCOVERING A DANGER WHEN THERE WAS NO REASON TO APPREHEND ANY PERIL?

a. WHETHER A SHIPOWNER MAKES OUT A JURY CASE OF AN INJURED SEAMAN'S COMPARATIVE NEGLIGENCE BY POSING A HYPOTHESIS OF THE SEAMAN'S ACTIONS?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Petitioner George Newman respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania of May 11, 1995, No. 0654 W.D. Allocatur, Docket 1994 denying Petition for Leave to Appeal the judgment and the opinion of the Superior Court of Pennsylvania entered on August 31, 1994 at Nos. 2032 PGH 92 and 2033 PGH 92, Reargument denied on November 14, 1994. Petitioner George Newman is a seaman who is exempted from prepayment of costs by 28 U.S.C. §1916.

OPINIONS BELOW

The Supreme Court of Pennsylvania issued no opinion. The opinions of the Superior Court and of the Court of Common Pleas which are not reported are reprinted hereto in the Appendix at pages A3-A15 and A19-A28 respectively.

JURISDICTION

Petitioner seeks a Writ of Certiorari to review the May 11, 1995 final judgment of the Supreme Court of Pennsylvania (Appendix A1) denying his cross petition to appeal the decision of the Superior Court of Pennsylvania on August 31, 1994.

The statutory provision conferring jurisdiction on this court is 28 U.S.C. §1257(a) (Appendix A46):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. §1257(a) gives this court jurisdiction via Writ of Certiorari to review final judgments of a highest state court "... where any title, right, privilege or immunity is specially set up or claimed under the Constitution ... or statutes of ... the United States." Petitioner claims rights and privileges under a federal statute, the Jones Act, 46 U.S.C. §688, and the privileges and immunities provision of the Fourteenth Amendment which are the supreme law of the land through the Supremacy Clause. The May 11, 1995 judgment of the Supreme Court of Pennsylvania denying permission to appeal the judgment of the Superior Court of Pennsylvania is a final judgment of the highest court in Pennsylvania. Constititution of Pennsylvania, Article 5, §2. The constitutional and federal statutory rights and

privileges Petitioner asserts include his right not to be found comparatively negligent in violation of the Jones Act and not to have his federal maritime privilege to receive prejudgment interest abridged by Pennsylvania in violation of the Fourteenth Amendment and federal maritime law.

The Pennsylvania Supreme Court has decided the federal issues discussed below in a way that conflicts with decisions of United States courts of appeal and applicable decisions of this court. Those state rulings fit squarely within this court's guidelines for Writs of Certiorari. See Rule 10.1(b) and (c) of the Rules of the Supreme Court of the United States: the considerations for a writ of certiorari include: "when a state court of last resort has decided a federal question in a way that conflicts with the decision(s) of . . . the United States Court(s) of Appeal." and "when a state court has decided an important question of federal law . . . in a way that conflicts with applicable decisions of this court."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Supremacy Clause of the United States Constitution, Article VI (Appendix A40):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant part of the Fourteenth Amendment, Section 1 (Appendix A40) commands:

(Ratified July 9, 1868)

> . . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.

The Jones Act, 46 U.S.C. §688 and the Federal Employer's Liability Act, §§51, 53 and 54 are reprinted in the Appendix at pages A43 and A44-A46.

STATEMENT OF THE CASE

This seaman's Jones Act negligence and unseaworthiness action was filed by Petitioner Newman (Newman herein) in the Court of Common Pleas of Allegheny County, Pennsylvania to recover damages for personal injuries he sustained in the course of his employment as a deckhand with Consolidation Coal Company (Consol) when a rope broke causing him to fall into the empty hold of a coal barge.

In compliance with *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983) and *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 1306 (1988) Newman presented evidence on reduction of future damages to present worth through an economist (Transcript Volume I, p. 300, 310 *et seq.*) and the trial court instructed the jury on that subject (Transcript Volume II, p. 772). There was no evidence that would permit the separate apportionment of the damages between negligence and unseaworthiness.

The only evidence supporting Consol's defense of comparative negligence was a hypothesis that Newman might have failed to discover the defect because he had a habit of inspecting lines and Consol had delegated its non-delegable duty to inspect to him. No evidence was presented that Newman inspected or failed to inspect the line, or that he discovered or missed any defect there. There was no evidence to negate a conclusion that Newman assumed the risk by using the rope with full knowledge of its defective condition. Newman has no memory of the accident (Appendix A38-A39). Stinson, the captain of the tugboat was about one-hundred (100) feet away and only saw Newman as he fell (Appendix A36-A38). There were no other accident witnesses.

Newman admits Consol presented testimony that it was Consol's policy for the deckhand to inspect the lines.[1] (See also Superior Court Memorandum Opinion, Appendix A13-A14). Consol contended that even if Newman wasn't officially responsible for inspecting the lines, he was negligent in failing to follow his admitted customary practice of checking the lines for defects. Consol argued in the alternative that Newman failed to exercise due care in inspecting the lines. Newman objected to the submission to the jury of his alleged negligence because as a matter of federal law that evidence did not prove the defense. The jury answered special interrogatories finding Consol was negligent, its vessels were unseaworthy and both were legal causes of Newman's injuries (Memorandum Opinion, Appendix A4-A5). The jury also concluded that Newman was 11.83% negligent and found damages in the amount of $1,327,000. (*Id.*) Newman filed a motion for prejudgment interest from the date of the accident, April 27, 1989 to November 25, 1991, the date of the verdict, (Appendix A33)[2] and post trial motions attacking the finding of comparative negligence. The trial court upheld the finding of comparative negligence and granted Newman prejudgment interest[3] in the amount of $107,190.40 in an Order dated November 16, 1992 (Appendix A17). That Order denied interest from the date of the accident April 27, 1989 to January 25, 1991, employing Pa. Rule Civ. P.

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[1] Judge McFalls rejected that policy as contrary to law.

[2] By design the motion did *not* request Rule 238 Delay damages. (*Id.*)

[3] The trial judge employed Pennsylvania Rule of Civil Procedure 238 (Appendix A47-A50) which speaks of damages for delay. Pennsylvania law is settled that Rule 238 damages are prejudgment interest. *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 436 A.2d 147, 154 (1981), appeal dismissed, *sub nom.*, *Bucheit v. Laudenberger*, 456 U.S. 940 (1982).

238. There was no finding of peculiar or exceptional circumstances to deny or reduce prejudgment interest. Newman argued that the question of his comparative negligence and his right to prejudgment interest from the date of the accident to the date of the verdict were matters exclusively of federal law.

Consol argued below that its own negligence cancelled its obligation to pay prejudgment interest on the unseaworthiness count because Newman did not apportion the damages between the two causes. There is no evidence such apportionment was possible.

Consol also contended to the Pennsylvania courts that it did not have to pay any prejudgment interest because the verdict was not apportioned between past and future damages. This verdict was reduced to present worth at the trial court's direction. That is to say, Mr. Newman got only today's dollar value of the damages he will sustain in the future.

On appeal a three judge panel of the Superior Court of Pennsylvania affirmed in part and reversed in part (Appendix A2-A15). The panel upheld the lower court's decision that the possible failure of a seaman to discover the defective condition that injured him was sufficient evidence of comparative negligence, rejecting Newman's argument that conduct was not comparative negligence. Newman based that argument on §§53 and 54 of the F.E.L.A. which are incorporated by reference into the Jones Act and *Paluch v. Erie Lackawanna R.R. Co.*, 387 F.2d 996, 999 (3d Cir. 1968): "Certainly it is not contributory negligence to fail to discover a danger when there is no reason to apprehend one."; *Morran v. Pennsylvania R.R. Co.*, 321 F.2d 402 (3rd Cir. 1963) (same); *Maylie v. National R.R. Passenger Corp.*, 791

F.Supp. 477, 488 (E.D. Pa. 1992) (failure of an employee to follow his habit of inspecting is not contributory negligence); *Benson v. American Export Isbrandtsen Lines, Inc.*, 478 F.2d 152 (3rd Cir. 1973) (the mere postulation by the shipowner of a series of hypothetical acts is not sufficient evidence of the seaman's contributory negligence to submit the issue to the jury.)

The panel reversed the award of prejudgment interest to Newman in its entirety reasoning that only the jury could award prejudgment interest[4] (Memorandum Opinion, Appendix A12-A13). Superior Court did not accept Newman's argument citing *Snyder v. Whittaker Corp., supra; McCormack v. Noble Drilling Corp., supra,* that the trial judge properly awarded prejudgment interest since there were no peculiar or exceptional circumstances to deny them. The Memorandum Opinion did not discuss Newman's further argument under *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed. 2d 9, 94 (1974), that there was no statute or established and inflexible rule to justify the denial to Mr. Newman, a seaman ward of the court, of the remedy of prejudgment interest.

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[4] The trial judge decreed December 16, 1992, when judgment was entered, as the starting date for post verdict interest in an order dated August 2, 1995 (Appendix A29). The ruling complied with Superior Court's mandate forbidding prejudgment interest. That date, if not changed, will deprive Petitioner of another year's interest on his damages and afford Consol the use and earnings of Newman's funds for the same time. The loss to Newman at 6% will exceed $60,000. The express terms of Paragraph (c)(4) of the Federal Interest Statute, 28 U.S.C. §1961 (Appendix A42), exempt the state court from its reach. Consequently the decision in *Kaiser Aluminum & Chemical Corp. v. Borjorno,* 494 U.S. 827 (1990), construing that legislation is not applicable. Determination of Newman's right to prejudgment interest can correct this wrong.

Superior Court denied cross petitions for reargument (Appendix A30-A31) and the Supreme Court of Pennsylvania denied cross petitions for allowance of appeal on May 11, 1995 (Appendix A1). As the opinions in this case demonstrate, Newman has preserved these federal questions throughout the entire Pennsylvania Legal System.

Newman has filed a timely petition for Writ of Certiorari to this court for review of both rulings.

REASONS FOR GRANTING THE WRIT

I. The State Wide Decision To Preclude Judges From Adding Prejudgment Interest In Maritime Jury Cases Is Contrary To The Reasoning Of The Intervening Decision Of This Court In *City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, _____ U.S. _____, 115 S.Ct. 2091 (1995) And That In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 583 (1974) And Decisions Of Several United States Courts Of Appeal.[5] The Division On The Issue Between The Federal Courts, The Compelling Need For A Uniform Maritime Rule And The Far Reaching Scope Of The Rule Pennsylvania Has Adopted Merit Review By This Court To Promote Uniform National Maritime Law. Pennsylvania Is A Populous State With Several Busy Ports And A Large Marine Commerce.

While the instant decision of Superior Court is not reported, it is based on that court's reported decision in *Musumeci v. Penn's Landing Corp.*,* 640 A.2d 416 (Pa. Super. 1994), which is of state wide application. The division on this issue among the courts of appeal leads to uncertainty and encourages forum shopping and the piling up of litigation in jurisdictions hospitable to prejudgment interest. Litigants will also be encouraged to file suit in the federal courts which are already overburdened rather than the state courts, as Congress has permitted and which are fully competent to resolve these disputes. The strong national policy in favor of a uniform federal law deserves the consideration of this

[5] *Snyder v. Whittaker Corp.*, 839 F.2d 1085 (5th Cir. 1988); accord *McCormack v. Noble Drilling Corp.*, 608 F.2d 169, 175 (5th Cir. 1979); *Stissi v. Interstate and Ocean Transport Co. of Philadelphia*, 765 F.2d 370, 377 (2nd Cir. 1985); *Columbia Brick Works, Inc. v. Royal Ins. Co. of America*, 768 F.2d 1066, 1069 (9th Cir. 1985); *M & O Marine Inc. v. Marquette Co.*, 730 F.2d 133 (3rd Cir. 1984); *Magee v. U.S. Lines*, 976 F.2d 821, 822-823 (2nd Cir. 1992).

* The decision in *Musumeci* was handed down after oral argument in this case.

court. Parties whose rights are controlled by uniform federal law should not be exposed to different treatment depending on the particular place where the litigation is conducted. Petitioner, the ward of the Court, should be accorded his federal due under maritime law and the Supremacy Clause.

Newman, a seaman injured on a vessel in navigable waters, was the victim of a maritime tort and his rights are governed by federal maritime law. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953). Because of the Supremacy Clause, Pennsylvania may not deprive him of any substantial federal right. (*Id.* at 411). Federal tort rights including the cause of action, the rules for liability and particularly the items of damage are the sole province of national law. *Norfolk and Western R. Co. v. Liepelt*, 444 U.S. 490 (1980).

The question of the right of a railroader or seaman to prejudgment interest is a matter of federal law and a state may not impose a state interest law in such cases that conflicts with federal law. *Monessen, supra.* The parties agree that "there is a judicially established, general federal rule governing the award of prejudgment interest in admiralty cases which holds that interest should be awarded absent extraordinary circumstances and that the court has broad discretion to determine when it should commence and what rate to apply. *Middle East Engineering*, 675 F.Supp. at 857 . . ." (Consol's Brief to Superior Court, page 38).

Seamen are entitled to their remedies in the absence of any contrary statute or established and inflexible rules. *Sea-Land Services, Inc. v. Gaudet, supra.* The rule of the majority of state and federal courts that a recovery by the deceased for injuries during his lifetime

bars an action for wrongful death after his demise is not such an established and inflexible rule as to bar the action of the deceased seaman's widow. (*Id.*)

There is no legislation forbidding prejudgment interest in maritime cases. *City of Milwaukee v. Cement Div., Nat. Gypsum Co., supra.* "The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss." (*Id.* at 2095). It is reversible error to deny a maritime party prejudgment interest even though he was two-thirds at fault. Such fault is not a peculiar or exceptional circumstance. (*Id.*)

The reasons urged to deny Petitioner prejudgment interest are much less compelling than those found insufficient in *City of Milwaukee.* As in *Gaudet* there is no federal statute or established and inflexible rule of maritime law forbidding a trial judge from adding prejudgment interest to a jury verdict.

Consol has argued that because the employee who recovers for negligence only cannot receive prejudgment interest, *Monessen, supra,* neither can the employee injured by both negligence and unseaworthiness. That reasoning rewards the negligent shipowner who by definition is more culpable than the one held in only on the liability without fault of unseaworthiness and is not supported by statute or established or inflexible rule. The non-negligent shipowner responsible only for unseaworthiness must pay prejudgment interest while the careless owner is excused by his own negligence. Curiously enough several circuit courts have accepted the argument. See, *e.g. Colburn v. Bunge Towing, Inc.,* 883 F.2d 372, 378 (5th Cir. 1989) (dicta).

Consol's negligence and the unseaworthiness of its vessel have resulted in injuries that cannot reasonably be allocated between negligence and unseaworthiness. Consol's argument that the failure to apportion the damages between negligence and unseaworthiness defeats the claim for prejudgment interest was rejected in *Magee v. U.S. Lines, Inc., supra* at 976 F.2d 822-823. That court noted the conflict of opinion on the issue in the circuit courts. That conflict should be resolved here. In this circumstance at common law defendant bears the cost of that impossibility because its unlawful acts created it. See *Prosser and Keeton On Torts*, Fifth Edition, page 347:

> Where two or more causes combine to produce such a single result, incapable of any reasonable division, each may be a substantial factor in bringing about the loss, and if so, each is charged with all of it.

(*Id.*) The Ninth Circuit accepted that reasoning in the maritime case of *Newby v. F/V Kristen Gail*, 937 F.2d 1439, 1442 (9th Cir. 1991) quoting *U.S. v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975). If contrary to the discussion, *infra*, Newman is finally adjudged comparatively negligent, his damages will be reduced and he will not receive prejudgment interest for his proportional fault. See *City of Milwaukee, supra.* If he is not negligent, as he earnestly contends, there should be no reduction.

Consol also insisted in the Pennsylvania courts that it did not have to pay any prejudgment interest because the verdict was not apportioned between past and future damages. This verdict was reduced to present worth at the trial court's direction. That is to say, Mr. Newman got only today's dollar value of the damages he will sustain in the future. Once again, no statute or fixed and

inflexible rule requires that result. Acceptance of the argument will give Consol a double deduction: first to present worth and then denial of interest on the present value of the future damages.

The rule adopted by some federal courts and the Pennsylvania Judiciary will add additional expense and needlessly further complicate an already intricate field. The reasonableness of the litigants' demands and offers bears on the question. Generally, however, settlement negotiations are irrelevant. Rule 408 *Federal Rules of Evidence*. The court, jury and parties might well have to go through the time, trouble and expenses of a second mini-trial after the main verdict before the same jury or a complete new trial with a new jury. The result is contrary to the policy of "just, speedy and inexpensive determination of every action" set forth in Rule 1, Fed. R. Civ. Proc.

Certiorari should be granted on this question to settle the wide divisions in the Circuit and lower courts so shipowners, seamen and others will be protected from unpredictable localized variations by a uniform desirable national standard.

II. The Final Decision Of The Pennsylvania Supreme Court In This Case That Newman's Conjectural Failure To Inspect Or Negligent Inspection Of The Rope Is Comparative Negligence Abridged Petitioner's Federal Right To Have Consol Perform Its Nondelegable Legal Duty Contrary To The Fourteenth Amendment And Permitted Consol To Delegate That Duty In Conflict With The Decisions Of The Court In *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58 (1943); *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963).[8]

The State Court Holding That A Shipowner Makes Out A Jury Question On The Issue Of A Seaman's Comparative Negligence By Presenting A Hypothetical That He Might Have Inspected The Rope Or Negligently Performed The Inspection Is Contrary To The Decisions Of The Third Circuit In *Benson v. American Export Isbrandtsen Lines, Inc.*, 478 F.2d 152 (3rd Cir. 1973); *Paluch v. Erie Lackawanna R.R. Co.*, 387 F.2d 996 (3rd Cir. 1968); *Morran v. Pennsylvania R.R. Co.*, 321 F.2d 402 (3rd Cir. 1963) And, In Violation Of The Fourteenth Amendment, Deprived Newman Of His Federal Right To Have His Conduct Measured By A Uniform National Standard.

This question presents the legal issue of what conduct constitutes a seaman's comparative negligence as a matter of law. While the discussion must consider whether the facts meet that legal standard, the case does not present a question of the application of the law to fact, *vel non*.

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[8] See also *Birchem v. Burlington Northern R. Co.*, 812 F.2d 1047 (8th Cir. 1987) (railroad does not prove employee was comparatively negligent by attempting to transfer its nondelegable duty to him).

The question of what legal standard is used to measure the seaman's comparative negligence is of national importance and historically significant. Congress has abolished assumption of the risk and enacted a federal law governing the standards for a seaman's recovery of injuries in the workplace. Because of that national interest, the need for uniformity and the conflict of the decision of the Pennsylvania court with decisions of this court and of federal courts of appeals, this question merits review by the Supreme Court of the United States.

The Jones Act expressly incorporates the remedial provisions of the F.E.L.A.: "... all statutes of the United States modifying or extending the common-law right of remedy in cases of personal injury to railway employees shall apply ..." to seaman's actions for personal injury. 46 U.S.C. §688. §54 of the F.E.L.A. abolished the defense of assumption of risk; §53 adopted the doctrine of comparative negligence for railroad and seaman employees. "... We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by (45 U.S.C. §54)." *Tiller v. Atlantic Coast Line R. Co., supra.*

A shipowner's duty to prevent unseaworthy conditions is absolute, continuing and nondelegable. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960), *citing Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 103 (1944). The holding of the state court improperly permitted Consol to transfer its nondelegable duty of inspection to Newman. The employer's duty to inspect the workplace, and tools, is just as nondelegable in the negligence claim, *Shenker v. Baltimore & Ohio R.R. Co., supra,* as it is in the unseaworthiness count.

> We believe that the better rule is the one followed by the federal courts; that is, when there is no evidence from which a jury could reasonably find a lack of due care by the plaintiff, it is reversible error to submit the issue of contributory negligence to the jury. *E.g., Paluch v. Erie Lackawanna Railroad Co., supra,* 387 F.2d at 999. *Morran v. Pennsylvania Railroad Co., supra,* 321 F.2d at 403-404.

Wilson v. Burlington Northern, Inc., 670 F.2d 780, 784 (8th Cir. 1982) Rehearing denied March 26, 1982, *Cert. den.* 457 U.S. 1120. The defendant shipowner bears the burden of proving the affirmative defense of the seaman's negligence. *Paluch, supra; Morran, supra; Mason v. Mathiason Tanker Industry, Inc.*, 298 F.2d 28 (4th Cir.), *cert. denied*, 371 U.S. 828, 83 S.Ct. 23, 9 L.Ed. 2d 66 (1962).

There were only two witnesses to the accident, Stinson and Newman; neither can supply any evidence of what happened. Newman has no memory and Stinson only saw Newman as he fell. Taking Consol's best argument Newman inspected the rope in accordance with his usual practice. Once again, there is no evidence he discovered any defect. If he did discover a defect and knowingly used the rope anyway, he assumed the risk which is no defense. 45 U.S.C. §54; *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255 (2nd Cir. 1973).

Consol's presentment of several theories in support of its defense that Mr. Newman was contributorily negligent, did not satisfy the burden of proof required to permit the issue to be submitted to the jury. *Benson v. American Export Isbrandtsen Lines, Inc., supra.*

The employee is not contributorily negligent for failing to discover a danger he had no reason to apprehend. *Paluch v. Erie Lackawanna R.R. Co., supra;*

Morran v. Pennsylvania R.R. Co., supra. See also, Chesapeake & O.R. Co. v. Proffitt, 241 U.S. 1102 (1916) ("[t]he employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence."); *Cooper v. Loper,* 923 F.2d 1045, 1050 (3rd Cir. 1991) (shipowner's employee has a right to rely on other employees to act to prevent the accident given the conditions of his employment).

Certiorari is indicated in this case to set and enforce uniform national standards on both questions presented and to correct the state court's deviation from those national standards.

CONCLUSION

For the foregoing reasons, Mr. Newman submits that the questions presented by this Petition are substantial and merit review by this Court.

Respectfully submitted,

LESTER E. ZITTRAIN
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Date: August 8, 1995

APPENDIX

Order Of The Supreme Court Of Pennsylvania
Of May 11, 1995

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 654 W.D. Allocatur Docket, 1994

Petition for Allowance of Appeal
from the Superior Court

Cross-Petition for Allowance of Appeal

GEORGE NEWMAN,
Respondent-Cross Petitioner,

v.

CONSOLIDATION COAL COMPANY, a corporation,
Petitioner-Cross Respondent.

ORDER

PER CURIAM:

AND NOW, this 11th day of May, 1995, the Petition for Allowance of Appeal and the Cross-Petition for Allowance of Appeal are denied.

Mr. Justice Frank J. Montemuro is sitting by designation.

A True Copy Irma T. Gardner
as of: May 11, 1995
Test: IRMA T. GARDNER
Deputy Prothonotary
Supreme Court of Pennsylvania

Judgment Of The Superior Court Of Pennsylvania
Dated August 31, 1994

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

NO. 2032 PITTSBURGH 1992

GEORGE NEWMAN,

Appellant,

-v-

CONSOLIDATION COAL COMPANY,
A CORPORATION.

NO. 2033 PITTSBURGH 1992

GEORGE NEWMAN AND
SUZANNE NEWMAN, HIS WIFE,

-v-

CONSOLIDATION COAL COMPANY,

Appellant.

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of ALLEGHENY County be, and the same is hereby AFFIRMED IN PART AND REVERSED IN PART. CASE IS REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS MEMORANDUM. JURISDICTION RELINQUISHED.

BY THE COURT:

ELEANOR R. VALECKO
DEPUTY PROTHONOTARY

DATED: August 31, 1994

Memorandum Of The Superior Court Of Pennsylvania
Filed August 31, 1994

[1] IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 2032 PITTSBURGH 1992

GEORGE NEWMAN,

Appellant,

v.

CONSOLIDATION COAL COMPANY,
A CORPORATION.

Appeal from the Judgment Entered December 16, 1992,
in the Court of Common Pleas of Allegheny County,
Civil Division, No. GD90-00980
ISSUE NO. 141515

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 2033 PITTSBURGH 1992

GEORGE NEWMAN AND
SUZANNE NEWMAN, HIS WIFE,

v.

CONSOLIDATION COAL COMPANY,

Appellant.

Appeal from the Judgment Entered December 16, 1992,
in the Court of Common Pleas of Allegheny County,
Civil Division, No. GD90-00980

BEFORE: CAVANAUGH, HUDOCK, AND
FORD ELLIOTT, JJ.

MEMORANDUM: FILED: AUGUST 31, 1994

These cross-appeals are from the judgment entered December 16, 1992, in the Court of Common Pleas of Allegheny County. We affirm in part and reverse in part.

On April 27, 1989, George Newman was employed by Consolidated Coal Company (hereinafter "Consol") as a deckhand. On that particular day, Mr. Newman was working on the M.V. Elizabeth, a towboat. The crew of the M.V. Elizabeth had been directed to move Barge No. 1029 from Consol's barge repair facility to its empty [2] fleet located across the Monongahela River. While Mr. Newman was standing in the center of the port-side gunnel of Barge 1029, attempting to tie it to the timberheads of another barge, the rope allegedly broke causing him to fall backwards into the empty steel hold of the barge. Mr. Newman suffered serious permanent injuries as a result of the fall.

Consequently, Mr. Newman and his wife filed a civil action against Consol under the Jones Act, 46 U.S.C.A. §688 and general maritime law. On November 15, 1991, the suit proceeded to a jury trial. Prior to trial, the parties stipulated that Mr. Newman was a seaman employed by Consol on the date of the accident and that the M.V. Elizabeth and Barge 1029 were vessels owned by Consol and in navigation of the Monongahela River, a navigable river in the United States. After hearing all the evidence and being charged by the trial court, the jury returned a verdict in favor of Mr. Newman. The jury found Consol liable under the Jones Act and the unseaworthiness doctrine. The jury also found Mr. Newman to be contributorily negligent at the rate of 11.83%. Damages in the amount of $1,327,000 were awarded.

Subsequently, Consol filed post-trial motions alleging numerous trial errors. Mr. Newman also filed a post-trial motion, requesting the grant of a partial judgment n.o.v. on the grounds that Consol failed to sustain its burden of proving Mr. Newman's contributory negligence. All motions for post-trial relief were denied. The trial court granted Mr. Newman's motion for pre-judgment interest and molded the verdict to reflect that interest and the finding of contributory negligence.

[3] On December 16, 1992, the verdict was reduced to judgment, and the parties filed cross-appeals from the orders denying their respective post-trial motions. Consol, in its appeal from the order denying its motion for a new trial, raises the following issues for our consideration:

> I. Did the trial court abuse its discretion in not granting Consol a new trial and/or a mistrial based on Newman's counsel's repeated reference to previously excluded evidence and/or on Newman's counsel's improper remarks during closing argument?
>
> II. Did the trial court abuse its discretion in not granting Consol a new trial based on its issuance of misleading and/or incomplete jury instructions?
>
> III. Did the trial court commit an error of law in awarding Pa. R.C.P. 238 delay damages as a matter of law?

On his cross-appeal, Mr. Newman raises the following issues for our consideration:

> I. Did the trial court err in denying prejudgment interest from April 27, 1989 through January 25, 1991, where the court did not find any exceptional circumstances?

II. Did Consol fail to meet its burden of proving negligence by failing to present legally sufficient evidence that George Newman did not exercise due care in performing his job as a deckhand?

III. Is George Newman entitled to post-verdict interest and if so, does this court have authority to mold the verdict to add interest?

[4] We shall address the issues in the order presented. First, Consol contends that the trial court abused its discretion in failing to grant a new trial based upon Mr. Newman's counsel's alleged improper references to excluded evidence and alleged improper closing argument. We find no abuse of discretion.

Consol contends that Mr. Newman's counsel made repeated references to documents which had been excluded as evidence, and such references caused great prejudice. The documents at issue, Plaintiff's Exhibits 15 and 17, were an accident investigation report and a post-accident remedial safety alert, respectively. Although not entirely clear from the record (much of the discussion concerning the admissibility of Exhibit 15 occurred off the record), it appears as though the two exhibits were ruled inadmissible for purposes of proving the alleged negligence, but could be referenced for purposes of impeachment and to refresh witnesses' recollections. Consol contends that on at least eight separate occasions Mr. Newman's counsel improperly referred to these exhibits after the court had already ruled them inadmissible. Our review of the transcript reveals that Consol's claim is somewhat exaggerated.

Of these eight alleged improper references, the first three concern the initial attempts to introduce the documents. (There were two attempts to introduce Exhibit 15 since the trial court deferred ruling on the

matter the first time it was raised.) There was nothing improper as to these three occurrences since a party is certainly entitled to attempt to introduce exhibits into evidence. Neither of the exhibits had yet been ruled inadmissible [5] during those three instances. Of the remaining five occurrences which Consol calls to our attention, one refers to a situation where the excluded document was referred to by a witness spontaneously, unprompted by counsel. Another occurence involved the use of Exhibit 15 to impeach one of Consol's witnesses, Mr. Orr. Consol contends that Exhibit 15 could not be referenced to impeach Mr. Orr since he had not participated in preparing that document. However, to the extent that Exhibit 15 was an official document of Consol and represented the company's findings as to its investigation, and Mr. Orr, testifying as Consol's corporate representative, was proffering a different position for Consol, we find that counsel for Mr. Newman was entitled to some latitude in utilizing Exhibit 15 to impeach Mr. Orr. A third occurrence involving a reference to the policy change in Exhibit 17 was asked, on re-direct examination, after Consol's counsel had opened the door by asking an open-ended question regarding policy at Consol for checking leaving lines. Consol's counsel had not restricted his question to periods before the accident, even though the trial court had previously instructed counsel to do so. Thus, Mr. Newman's counsel's reference to Exhibit 17, in that instance, was somewhat baited by Consol's counsel.

Thus, when the record is closely examined, there are only two instances, in the entire transcript, where Mr. Newman's counsel improperly referred to the excluded exhibits. While we do not condone such conduct on the part of counsel, we cannot find the trial court abused its discretion in failing to grant a new trial on the basis of

those two occurrences. Each time, the question [6] was immediately objected to and sustained. Additionally, the trial court, after these two instances had occurred, specifically instructed the jury that references to anything which occurred post-accident were immaterial and not to be considered by them. Accordingly, any minimal prejudice which may have occurred because of these two improper references to excluded exhibits was cured by the court. Based on an abuse of discretion standard of review, this court will not grant a new trial on this matter.

Consol also argues for a new trial based upon alleged improper remarks made by Mr. Newman's counsel during his closing argument to the jury. Consol refers to Mr. Newman's remarks about punitive damages; about Mr. Orr's being a liar, perjurer, and manufacturing evidence; and about the reputation of Consolidated Coal Company as being so prejudicial as warranting a new trial. Instantly, we note that

> While counsel are required to stay within reasonable bounds in making their partisan pleas to a jury, this does not mean that their speeches may not be spirited, stirring, and accusatory, if the material of the trial supplied them with relevant oratorical ammunition. There is nothing in the law, and certainly nothing in the history of American forensic appeal, which remotely suggests that a lawyer's summation must be a prosaic and dull affair, devoid of metaphor, empty of simile, and stranger to dramatic, poetical, or sentimental allusion. So long as no liberties are taken with the evidence, a lawyer is free to draw such inferences as he wishes from the testimony and to present his case in the light most suited to advance his cause and win a verdict in the jury box.

Contractors Lumber and Supply Co. v. Quinette, 386 Pa. 517, _____, 126 A.2d 442, 444 (1956).

[7] Recognizing that counsel is afforded a great degree of latitude in arguing to the jury, we must note that Mr. Newman's counsel has certainly pushed the envelope in this case. The remark concerning a lack of commentary about Consol's history because counsel "didn't want to blacken their character" is quite inconsequential. The remark was merely in response to argument made by Consol's counsel in his opening discussing Consol's history in an attempt to convey a positive image about the company. There was no prejudice created by this remark. With respect to the other remarks, while these may have created some prejudice, any such prejudice was certainly cured by the extensive and accurate charge on the law offered by the trial court. The trial court, in a part of its charge covering more than four pages of the trial transcript, carefully detailed for the jury their role as triers of fact and their responsibility in assessing the credibility of the witnesses. The trial court's charge also includes over five pages on the proper measure of damages to be applied by the jury in the case. Accordingly, we find the trial court's charge to the jury countered any prejudice which may have arisen from Mr. Newman's counsel's closing remarks to the jury. Therefore, a new trial is not warranted, especially when we consider that "the handling of [alleged prejudicial remarks during argument] are largely within the broad powers and discretion of the trial judge and his actions will not be disturbed on appeal unless there is an obvious abuse of discretion." *Wilf v. Philadelphia Modeling & Charm School, Inc.*, 205 Pa. Super. 196, _____, 208 A.2d 294, 298 (1965). Presently, we cannot find an obvious abuse of [8] discretion on the part of the trial court in failing to grant a new trial in light of the alleged prejudicial remarks made during Mr. Newman's counsel's closing.

Consol's second issue concerns alleged incomplete and erroneous jury instructions. Consol points to numerous proposed jury instructions which were denied or modified and attempts to attach error to those rulings. In considering a claim of this nature, we must determine whether the proffered instructions represent a complete and accurate statement of the law applicable to the facts of the case. If not, then the trial court acts properly in refusing to give the instructions. *See Parnell v. Taylor*, 266 Pa. Super. 74, 403 A.2d 100 (1979).

First, Consol claims error in refusing its requested supplemental points 1 and 2, while granting Mr. Newman's point 4. Supplemental points 1 and 2 concern the scope of Mr. Newman's duty to inspect the rope and his ability to recover if he failed in that duty. Consol based those requested instructions on a holding from the First Circuit in *Peymann v. Perini Corp.*, 507 F.2d 1318 (1st Cir. 1974), wherein that court held that a seaman may wholly be barred from recovery based upon his own negligence. As Mr. Newman correctly notes, *Peymann* merely pronounces a narrow exception to the general rule that a shipowner has an absolute and nondelegable duty to supply a vessel which is reasonably safe for its intended use. That duty includes maintaining the ship's equipment in proper operating condition. *See Klineburger v. Maritrans*, 404 Pa. Super. 490, 591 A.2d 314 (1991). Under the general rule, a seaman's negligence may reduce the amount of [9] damages for which the shipowner is liable, but does not defeat the seaman's right to recovery. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

The *Peymann* holding, which carves a narrow exception out of the general rule, has been limited in its applicability to cases involving supervisory employees

and applies only when the employee's negligence is the sole cause of the injury. *See Kelley v. Sun Transportation Co.*, 900 F.2d 1027 (7th Cir. 1990). Presently, the facts in this case do not warrant a charge based on *Peymann*. Instead, the facts are more amenable to a charge on the general rule. Accordingly, the trial court did not err in refusing supplemental points 1 and 2, and in charging on Mr. Newman's point 4.

Next, Consol complains that the trial court erred in failing to instruct the jury according to its proposed Point for Charge 13. That requested charge read as follows:

> The mere happening of an accident does not make a defendant liable; nor does it raise any presumption of negligence or fault on the part of a Defendant. Accidents frequently occur through no one's fault. The burden of proof is upon Plaintiff to prove, by a preponderance of the evidence, that the Defendant was negligent and that Plaintiff's injury was causally related to such negligence.

Were this merely a Jones Act case, Consol's proffered charge may have been a correct statement of the law. However, the underlying suit was based upon the doctrine of unseaworthiness, as well, which involves liability without fault. Since the proposed charge makes no attempt to distinguish between the two theories, under the facts of this case the charge is not a completely accurate [10] statement of the law as it applies to the facts of this case. Accordingly, the charge was properly refused.

Consol also raises arguments concerning the trial court's refusal to charge on its Points for Charge Nos. 10, 14, and 25. We note, based upon our review of the transcript, that Consol failed to except to the trial court's refusal to grant these instructions. Accordingly, any

issues concerning those proposed instructions are deemed waived for purposes of appellate review. *See Geyer v. Steinbronn*, 509 Pa. Super. 632, 506 A.2d 901 (1986); Pa. R.A.P. 302(b).

Consol's third issue concerns the decision of the trial court to award Rule 238 damages in this case. We agree with Consol that the trial court erred in this respect. This very issue was recently addressed by a panel of this court in *Musumeci v. Penn's Landing Corp.*, No. 3531 Philadelphia 1992 (filed March 2, 1994). In *Musumeci* this court undertook a detailed analysis of the availability of an award of prejudgment interest in cases brought under federal maritime law. The *Musumeci* court concluded that there was no "authority for permitting plaintiffs to elect between maritime law prejudgment interest and Rule 238 delay damages." *Musumeci*, slip op. at 11. Accordingly, "it was improper for the trial court to award Rule 238 delay damages in this maritime case . . ." *Id.* at 12. For the same reasons outlined in *Musumeci*, we also conclude that the trial court erred in awarding Rule 238 delay damages. Consequently, we will vacate for [11] a recalculation of damages and the entry of judgment to reflect an appropriate deduction for the amount of delay damages that were improperly awarded initially.

The *Musumeci* court also considered, generally, when maritime law prejudgment interest is to be awarded. That part of the *Musumeci* case bears directly upon the first issue raised by Mr. Newman in his cross-appeal. In that issue, Mr. Newman contends that the trial court erred in failing to award prejudgment interest for the entire period from the date of injury through the date of verdict. As noted previously, the trial court chose to award Rule 238 delay damages and, pursuant to Rule

238, calculated damages from a date one year after service of original process. As noted previously, the trial court erred in awarding Rule 238 delay damages. However, the question remains: Was Mr. Newman entitled to an award of prejudgment interest under general principles of federal maritime law. The answer is no. As noted in discussion by the *Musumeci* court, and argued by Consol to this court, in jury actions involving federal maritime law issues, the award of prejudgment interest is discretionary, and that discretion must be exercised by the jury.

> The plaintiffs had the burden of going forward and bringing before the jury the issue of prejudgment interest. Our review of the record reveals that there was no request by the plaintiffs that the issue of prejudgment interest be given to the jury. Although the plaintiffs recognized that maritime law governed, they neglected to carry their burden of requesting that the question of prejudgment interest be presented to the jury.
>
> . . . [b]ecause the plaintiffs did not preserve this issue by requesting that the jury be permitted to decide the interest question, [12] we hold that it would be inappropriate to remand this issue to the trial court for further consideration.

Id. at 11.

This holding applies equally to the case at hand. Mr. Newman, as with the plaintiffs in *Musumeci*, failed to present the issue of prejudgment interest to the jury for its consideration. Therefore, such a claim, according to the analysis offered by the *Musumeci* court, is deemed waived.

Mr. Newman's second issue in his cross-appeal concerns whether the trial court erred in not granting his motion for judgment notwithstanding the verdict on the

issue of contributory negligence. In reviewing this issue it is our duty to determine whether there was sufficient evidence to sustain the verdict, giving the verdict winner (Consol on the contributory negligence claim) the benefit of all favorable inferences to be drawn from the evidence. *See Turner Hydraulics, Inc. v. Susquehanna Construction Corp.*, 414 Pa. Super. 130, 606 A.2d 532 (1992). Presently, the record demonstrates that there was sufficient evidence to sustain the finding of contributory negligence. In the context of Jones Act negligence, there is a duty imposed upon the seaman to protect himself. *See Klineburger v. Maritrans, supra.* Presently, Consol presented several witnesses who testified that the deckhand was responsible for inspecting the lines. Mr. Newman, himself, admitted that he had the practice of inspecting the lines with which he worked. From this testimony, the jury could reasonably conclude that Mr. Newman was contributorily negligent in failing to notice that the line was in poor condition before it [13] broke. Since a seaman's contributory negligence can be used to reduce damages for a shipowner's breach of warranty of seaworthiness, the trial court did not err in refusing to grant Mr. Newman's motion for judgment n.o.v. on this issue.

Mr. Newman's final issue concerns entitlement to post-verdict interest. Mr. Newman asks this court to award such interest and set the rate for calculation. Consol contends that the issue is waived because Mr. Newman failed to request an award to post-judgment interest from the trial court. Our review of the record reveals that Mr. Newman did file a Motion to Set Interest Rate with the trial court. However, because appeals were filed in this matter prior to the trial court's ruling on the motion, the trial court was divested of jurisdiction and never did issue a ruling. Consequently,

Mr. Newman is asking this court to rule on a matter which has yet to be considered by the trial court. This we will not do. Since the case is being remanded so that the verdict can be recalculated to deduct delay damages, the court is also instructed to consider the matter of post-judgment interest at that time.

Having now considered all issues raised in these cross-appeals, we affirm in part and reverse in part. The case is remanded to the trial court so that the award for delay damages can be deducted from the judgment, and the matter of post-verdict interest can be considered.

Affirmed in part and reversed in part, this case is remanded for further proceedings in accordance with this memorandum. Jurisdiction relinquished.

Order Of The Court Of Common Pleas
Of Allegheny County, Pennsylvania
Of November 16, 1992

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

No. G.D. 90-00980

GEORGE NEWMAN,

Plaintiff,

vs.

CONSOLIDATION COAL COMPANY, a corporation,
Defendant.

ORDER OF COURT

AND NOW, to-wit, this 16th day of November, 1992, after due consideration of briefs and oral argument, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Motion to Strike the Molded Verdict filed on behalf of defendant Consolidation Coal Company is granted;

2. The Motion for delay damages filed on behalf of plaintiff George Newman is granted;

3. The verdict amount is molded to reflect the 11.83% contributory negligence as found by the jury and the addition of delay damages calculated in accordance with the provisions of Rule 238, Pa. R.C.P.:

Verdict amount:	$ 1,327,000.00
Less 11.83% :	156,984.10
	$ 1,170,015.90

Delay damages as calculated from January 25, 1991 (one year after original process served) through November 25, 1991 (date of verdict):

11% (prime plus 1%) x $ 1,170,015.90	=	$ 128,701.74
$ 128,701.74 ÷ 365 days	=	$ 352.60
January 25, 1991—November 25, 1991	=	304 days
304 days x $ 352.60=(Total interest)	=	$ 107,190.40
Verdict:		$1,170,015.90
Plus interest:		107,190.40
		$1,277,206.30
Benefits paid as of September 12, 1992	=	32,686.89
Total:		$1,244,519.50

BY THE COURT,
McFalls, J., J.

cc: Paul Hammer, Esq.
James R. Miller, Esq.

Order Of The Court Of Common Pleas
Of Allegheny County, Pennsylvania
Of November 16, 1992

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW

No. G.D. 90-00980

GEORGE NEWMAN,

Plaintiff,

vs.

CONSOLIDATED COAL COMPANY, a corporation,
Defendant.

ORDER OF COURT

AND NOW, to-wit, this 16th day of November, 1992, after due consideration of briefs and oral argument, it is hereby ORDERED, ADJUDGED and DECREED that the Motion for Post-Trial Relief filed on behalf of defendant Consolidated Coal Company, a corporation, is denied.

BY THE COURT,
McFalls, J., J.

cc: Paul L. Hammer, Esq.
James R. Miller, Esq.

Opinion Of The Court Of Common Pleas Of Allegheny County, Pennsylvania

[1] IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA CIVIL ACTION—LAW

No. G.D. 90-00980

GEORGE NEWMAN,

Plaintiff,

vs.

CONSOLIDATED COAL COMPANY, a corporation,

Defendant.

OPINION

This action was brought under the theory of negligence under the Jones Act and under the theory of unseaworthiness. Plaintiff filed suit against defendant for injuries he sustained when a rope he was pulling on broke and he fell into the hold of the barge where he was working.

On November 25, 1991, the jury returned a verdict in favor of plaintiff in the amount of $1,327,000.00. Using special interrogatories, the jury found the defendant liable under negligence under the Jones Act and unseaworthiness. Plaintiff was found to be contributorily negligent for his injuries at the rate of 11.3%.

Defendant filed a Motion for Post-Trial Relief. Plaintiff filed a Motion for Post-Trial Relief, a Motion for Sanctions and a Motion for Pre-Judgment Interest.

[2] On November 16, 1992 orders were filed by the Honorable Patrick McFalls denying defendant's Motion for Post-Trial Relief, plaintiff's Motion for Post-Trial Relief and plaintiff's Motion for Sanctions. Also, on this date, the verdict was molded to reflect the 11.3% contributory negligence found by the jury and the addition of delay damages calculated in accordance with the provisions of Pa. R.C.P. 238. Defendant filed an appeal to this action and plaintiff filed a cross-appeal.

Defendant filed a Motion for Post-Trial Relief, asserting thirteen (13) grounds for a new trial. Defendant's request for a new trial includes allegations of error in the trial court's jury-instructions and in the trial court's refusal to grant defendant's request for a mistrial. Defendant further asserts its right to a new trial by claiming that plaintiff's counsel made outrageous and prejudicial remarks during the course of the trial.

Defendant argues that certain actions and remarks made by plaintiff's counsel were prejudicial in that they rendered the jury incapable of objectively weighing the evidence.

Defendant refers to an accident investigation report prepared by defendant which defendant claims plaintiff's counsel continually referred despite defendant's sustained objections. To support its argument, defendant cites the trial transcript at pages 68-73, 111-113, 194-198, 221, 484, 583-587 and 599. [3] Defendant next refers to Exhibit 17, a safety alert issued by defendant on May 2, 1989, five (5) days after the accident. Defendant cites to pages 166-169 of the trial record, where defendant's

objection to the introduction of this document was sustained by the trial court. Defendant then cites to two (2) occasions in which plaintiff's counsel attempted to refer to the document, at which times the defendant's objections were sustained (T.T. 218) and a cautionary instruction was given to the jury (T.T. 378-379).

Regarding Exhibit 15, this court finds that plaintiff's counsel's actions did not prejudice the defendant. Furthermore, defendant's allegations of prejudice are vague and unsubstantiated by the evidence produced at trial. The transcript references cited above disclose that when plaintiff's counsel referred to Exhibit 15, defense objections were sustained when appropriate and when appropriate, plaintiff's counsel was allowed by the court to refer to Exhibit 15.

Regarding Exhibit 17, the court took appropriate action by sustaining defendant's objections and issuing a cautionary instruction to the jury.

Defendant argues that the court erred by denying its Motion for Mistrial.

During direct examination of Mr. Newman, defense counsel moved for a mistrial claiming prejudice due to continued [4] reference by plaintiff's witness to excluded evidence. The trial court denied the defendant's request for a mistrial and issued the following cautionary instruction to the jury:

> THE COURT: As I have instructed other witnesses, activities that occurred subsequent to this accident are irrelevant to the issues in this case. And, therefore, I will tell you now to disregard that answer and any comments about what was done after, and I will instruct the witness to not refer to anything that you were told has occurred subsequent to this accident. The only things that

> we're interested in regarding the work conditions and your instructions, what you were told prior to the accident.
>
> (T.T. 378-379).

The above cautionary instruction corrected the error. The instruction made it quite clear to the jury that they were not to consider any testimony concerning actions taken after the accident. Moreover, defendant argues that plaintiff's counsel's actions were intentional and therefore a new trial is warranted. Defendant argues that based on plaintiff's counsel's actions the jury could only have concluded that the documents contained information damaging to the defendant's case.

The defendant's request for a mistrial was properly denied. While this court finds that no prejudice resulted to defendant, the court's cautionary instruction to the jury adequately addressed any possible problems that may have arisen. It is not the function of this court nor the defendant to speculate on what the jury may have based its verdict. It is the function of this [5] court to examine all of the evidence to determine whether or not it supports the verdict. Defendant only argues prejudice but does not support its argument with any evidence other than references to plaintiff's counsel's actions.

The evidence clearly supports the jury's verdict and the cautionary instruction more than adequately covered defendant's dilemma.

The defendant next contends that it is entitled to a new trial because plaintiff's counsel made improper and prejudicial remarks to the jury during closing arguments. Again defendant alleges that these remarks were made intentionally by plaintiff's counsel to prejudice the defendant.

Defendant points specifically to two (2) remarks made by plaintiff's counsel during his closing argument. The first remark was made during plaintiff's counsel's discussion of the witness Warren Dean Orr:

> . . . Captain Orr had the tenacity, ladies and gentlemen of the jury, to lie to you, to manufacture this Exhibit B in this courtroom and to offer it to you. Let's talk about in between. Under oath, under oath, ladies and gentlemen—you know, lawyers, good lawyers are truly offended by lies. We're all people. You know people do lie. But under oath. Ladies and gentlemen, when the issue of whether or not Mr. Newman was a seaman was important, Captain Orr repeatedly lied under oath. You [6] have the Coast Guard affidavit. You heard me read in other things. You know, ladies and gentlemen, that is reprehensible. That is terrible. Its too bad you cannot give punitive damages in this case.
>
> (T.T. 737).

Defendant then refers to another comment made by plaintiff's counsel late in his closing argument:

> Ladies and gentlemen, I respectfully suggest to you that if you do not send a message in your verdict to Consolidated Coal Company today, you're going to see more Captain Orrs and you're going to see more of this sort of behavior that has gone on in this case.
>
> (T.T. 746-747).

Defendant took exception to these remarks after plaintiff's counsel concluded his closing argument.

Defendant further argues that plaintiff's counsel repeatedly referred to Warren Dean Orr as a liar and perjurer and such statements were outrageous and impermissible.

Lastly, defendant contends that plaintiff's counsel made prejudicial statements relating to labor unrest between the coal industry and its workers in the mid-1900's. The statement cited is as follows:

> . . . At the start of this case, Mr. Miller gave you a little bit of the history of Consolidation Coal Company about getting coal for the Second World War and that. I'm not going to tell you anything about the history of Consolidation Coal and the coal owners of the last century or nearly century and a half in this community. I don't need to mention that to [7] you. I don't want to blacken their character. I am not going to do that. But in any event, here we are—lost my train of thought.
>
> (T.T. 735-736).

Defendant argues that these statements go beyond the scope of the evidence, even though defendant's counsel included background history of defendant in his opening statements.

The grant of a new trial for improper remarks is within the discretion of the trial judge and the judge's decision will not be overturned absent a gross abuse of discretion. *Harvey v. Hassinger,* 315 Pa.Super. 97, 461 A.2d 814 (1983).

This court finds that after a thorough review of plaintiff's counsel's closing argument, in its entirety, a new trial is not warranted. While this court does not necessarily condone the statements cited above, the court does not find that they went beyond the scope of the evidence or caused any unfair harm to the defendant's case. This court is further inclined to note that while defendant has raised several arguments based on prejudice, defendant has made no argument attacking the excessiveness of the verdict.

Defendant's final arguments concern claims of error on the part of the trial judge in the final charge to the jury.

Defendant first alleges the trial court erred by denying its supplemental points for charge that dealt with the plaintiff's duty to inspect the line and his responsibilities to his [8] his employer. The defendant claims that the court erred by granting plaintiff's point for charge No.4 which reads:

> Consol as a shipowner owed to Mr. Newman as a member of the crew the vessels employed aboard the vessels the nondelegable duty to keep and maintain the vessels and all gear, tools, and equipment of the vessel in a seaworthy condition at all times.

It is the defendant's contention that while the above statement is an accurate description of the law, the trial court's charge was incomplete in that it failed to include the defendant's supplemental points.

The court's final charge to the jury includes a complete and accurate statement of all applicable law relevant to the evidence in this case.

Several of the defendant's witnesses testified that the plaintiff was under a duty to inspect the line. The plaintiff testified that it was not his responsibility to inspect the line. In light of all the evidence the trial court correctly charged the jury on the doctrine of sea worthiness and contributory negligence. The verdict was returned in favor of the plaintiff. The jury found the plaintiff 11.3% contributorily negligent.

The defendant claims it was error for the court to deny the following charge:

> The mere happening of an accident does not make a defendant liable; nor does it raise any presumption of negligence or fault on the part of a

> defendant. Accidents frequently occur through no one's fault. The [9] burden of proof is upon plaintiff to prove, by a preponderance of the evidence, that the defendant was negligent and that plaintiff's injury was causally related to such negligence.

The court's denial of this point for charge was appropriate. The first sentence of the point does not make any distinction between negligence under the Jones Act and the doctrine of unseaworthiness nor does this sentence give an accurate statement of the law in relation to unseaworthiness. Moreover, the remainder of the requested point was adequately covered by the court's charge on burden of proof.

The defendant argues that the trial court erred in denying its point for charge No.35 which provided examples of contributory negligence.

The trial court properly denied this point because examples of contributory negligence were unnecessary and unwarranted. A thorough and complete explanation of contributory negligence was included in the court's final charge.

Having been given an accurate explanation of the law on contributory negligence, the jury was adequately prepared to apply this law to all the evidence that was presented at trial.

Next, the defendant attacks the court's denial of its requested point for charge, set forth as follows:

> A defendant cannot be charged with negligence by failing to anticipate that an employee would not take the ordinary and proper precautions to protect and safeguard his own health and welfare. Employees must as part [10] of their duties exercise due care for their own safety.

Defendant argues that the court erred in denying this point on the basis that it was covered by other instructions.

As stated prior in this opinion, the court properly and adequately addressed the issues raised in the above proposed point for charge. The court presented to the jury a complete explanation of contributory negligence and ordinary care in conformance with the law on these matters.

Lastly, the defendant claims that it was error for the court to refuse to comment on the evidence when it struck the following line from defendant's requested point for charge No.10:

> There is no evidence in this case that the defendant had any actual and prior knowledge of any condition relating to the line which would have caused it to break.

While it is not the practice of the trial court to comment on the evidence, the remainder of the requested point was granted. The granted portion of the point included the following statement:

> If you find that no employee or agent of the defendant, other than the plaintiff, had the opportunity or duty to inspect the line prior to plaintiff-husband's use of the line, the condition of the line would not have been anticipated or reasonably foreseen by defendant and you cannot under these circumstances find negligence on the part of the defendant.

Clearly, the above statement adequately covers the issues of concern to the defendant, while leaving an evaluation of the evidence in the hands of the jury.

[11] Plaintiff likewise presented the court with Post-Verdict Motions. Plaintiff first made a Motion for Partial Judgment n.o.v. alleging that plaintiff was not contributorily negligent and defendant did not meet its burden of proof on the issue.

As aforementioned, sufficient evidence was presented at trial to warrant a charge of contributory negligence and to support the jury's finding that the plaintiff was 11.3% contributorily negligent.

Plaintiff also presented the court with a Motion for Pre-Judgment Interest. While opposed by defendant on arguments based on federal law, the trial court granted the addition of delay damages to the verdict based on Pa. R.C.P. Rule 238 because the case was a personal injury action brought in a state court and thus plaintiff was entitled to delay damages as a matter of law.

In regards to plaintiff's Motion for Sanctions, the court properly denied the motion because the defendant committed no willful misconduct during the discovery process.

BY THE COURT,
McFalls, J., J.

cc: Paul L. Hammer, Esq.
James R. Miller, Esq.

Order Of The Court Of Common Pleas
Of Allegheny County, Pennsylvania
Of August 2, 1995

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW

No. G.D. 90-00980

GEORGE NEWMAN,

Plaintiff,

vs.

CONSOLIDATION COAL CORPORATION,

Defendant.

ORDER OF COURT

AND NOW, to-wit, this 2nd day of August, 1995, after due consideration of Petition for Clarification and Reconsideration filed on behalf of defendant Consolidation Coal Company and briefs, the Petition for Reconsideration is denied and a clarification of the Order of Court of February 14, 1995 is set forth as follows:

1. The post-judgment interest is to begin to run on December 16, 1992, the day judgment was entered; and

[2] 2. The post judgment interest rate of Ten percent (10%) reflects the prime rate of interest available on the date of the verdict, November 25, 1991; See *Matter of Banker's Trust*, 658 F.2d 103 (3rd Circuit 1981), on remand *Petition of Banker's Trust*, 569 F. Supp. 386 (E.D. Pa. 1983).

BY THE COURT,
McFalls, J., J.

cc: Paul L. Hammer, Esq.
James R. Miller, Esq.

Order Of The Superior Court Of Pennsylvania
Dated November 14, 1994

THE SUPERIOR COURT OF PENNSYLVANIA
OFFICE OF THE PROTHONOTARY
1015 Grant Building
Pittsburgh, Pennsylvania 15219

DAVID A. SZEWCZAK, ESQUIRE (412) 686-7502
Prothonotary

ELEANOR R. VALECKO
Deputy Prothonotary

November 14, 1994

James Robert Miller, Esquire
Two PPG Place
Suite 400
Pittsburgh, PA 15222

IN RE: GEORGE NEWMAN ET AL VS
CONSOLIDATION COAL NO. 2032 AND
2033 PITTSBURGH 1992

Dear Mr. Miller:

The court has entered the following order on your Petition for Reargement filed in the above captioned cases.

"ORDER OF COURT

The court hereby denied the applications filed September 13, and 14, 1994 requesting reargument or reconsideration of the decision dated August 31, 1994.

PER CURIAM"

DATE: NOVEMBER 14, 1994

Very truly yours,
ELEANOR R. VALECKO
Deputy Prothonotary

ERV/ksw
cc: Paul L. Hammer, Esquire
Honorable Patrick McFalls

[1] **Plaintiff's Motion for Pre-Judgment Interest**

Plaintiff, by his counsel, Paul L. Hammer, Esquire, respectfully moves this Honorable Court to award him pre-judgment interest on his unseaworthiness claim based on the long-standing Admiralty Rule so providing. In support thereof, Plaintiff alleges:

1. This is an action in part under the Admiralty Doctrine of unseaworthiness to recover for severe personal injuries incurred by Plaintiff on April 27, 1989, while employed as a deckman by Defendant.

2. It is the Admiralty Rule that plaintiffs in personal injury cases are entitled to pre-judgment interest from the date of the injury to the date of the judgment. *Callen v. Oulu O/Y*, 711 F.Supp. 244, 249, 250 (E.D. Pa. 1989); *Monaghan v. Uiterwyk Lines, LTD.*, 607 F.Supp. 1020, 1026 (E.D. Pa. 1985); *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1392 (footnote 11) (3 Cir. 1971); *Noel v. United Aircraft Corp.*, 342 F.2d 232, 240 (3 Cir. 1965); *McCormack v. Noble Drilling Corp.*, 608 F.2d 169, 175 (5 Cir. 1979); *Roy Crook & Sons, Inc. v. Allen*, 778 F.2d 1037, on rehearing at 1044 (5 Cir. 1985); *Sosa v. M/V Lago Izabal*, 736 F.2d 1028, 1031 (5 Cir. 1984); *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 999 (1962).[1]

3. On November 25, 1991, a jury returned a verdict in favor of Mr. Newman on his seaworthiness claim.

[2] 4. A period of two years and 7 months has transpired from the date of the accident on April 27, 1989 to the date of the verdict on November 25, 1991.

---

[1] See also *Dravo Mechling Corp. v. Standard Terminals, Inc.*, 557 F.Supp. 1162, 1167 (W.D. Pa. 1983), affd. 729 F.2d 1446; *M & O Marine, Inc. v. Marquette Co.*, 730 F.2d 133, 136 (3 Cir. 1984).

5. Plaintiff respectfully moves this Honorable Court to choose the prime rate of interest listed in the Comment to Rule 238 Pa.R.C.P. Those rates are: On January 3, 1989—10-½%; on January 2, 1990, 10-½%; and on January 2, 1991, 9-½ to 10%. *Monaghan*, supra at 1026.

6. Plaintiff computes pre-judgment interest in the following two ways:

a. Using the verdict of $1,327,000.00, interest of 10-½% from May 1, 1989, to January 1, 1991, a period of one year and 8 months or 1 and ⅔ years equals $139,335.00 for one year plus $92,797.11 for ⅔ of a year, for a subtotal of $232,132.11, plus 11 months in 1991 at 10% or $121,641.67, for total pre-judgment interest of $353,773.78.

b. $1,327,000.00 less contributory negligence of 11.83% or $156,984.01, which totals $1,170,016.00. Again, $1,170,016.00 times 10-½% for 1 and ⅔ years, that is from May 1, 1989 to January 1, 1991, equals $204,670.90, plus 11 months at 10% or $107,251.47, for a total of $311,922.37. Mr. Newman seeks a determination under alternative b above only if it is finally determined that he was in fact contributorily negligent, as found by the jury.

[3] WHEREFORE, Plaintiff, George Newman, respectfully moves this Honorable Court to award him pre-judgment interest as calculated above.

Respectfully Submitted,

PAUL L. HAMMER
PAUL L. HAMMER
Attorney for Plaintiff

Excerpts Of Jury Trial Proceedings
Of November 15, to November 25, 1991

[1] IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY PENNSYLVANIA

CIVIL DIVISION

GD No. 90-00980

GEORGE NEWMAN and
SUZANNE NEWMAN, his wife,

Plaintiffs,

vs

CONSOLIDATION COAL COMPANY,

Defendant.

Type of Proceedings: Jury Trial

Before: Hon. Patrick McFalls

Date: November 15, 1991 to November 25, 1991

Reported by: Teresa M. Benson, RPR
Official Court Reporter

COUNSEL PRESENT:
For the Plaintiff: Paul Hammer, Esq.
For the Defendant: James Miller, Esq.

VOLUME I
(November 15, 1991 to November 20, 1991)

* * *

[28] Mr. Stinson, I respectfully ask the Court to take judicial notice of the stipulation between the parties that Mr. Newman was a seaman employed by Consolidation Coal on 4/27/89 and that the Motor Vessel Elizabeth and Barge 1029 were vessels owned by Consol and in navigation on the Monongahela River, a navigable water of the United States, on 4/27/89.

MR. MILLER: All sounds right to me, Your Honor.

MR. HAMMER: Mr. Stinson, please.

TIMOTHY WILLIAM STINSON

having been first duly cautioned and sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAMMER:

Q. Tell us your name and home address, please. A. Timothy William Stinson, 1424 Hubber Street, Port Vue, PA.

Q. How old are you? A. 38.

Q. What is your education? A. Graduated high school. I have approximately two years of college.

Q. What high school did you graduate from? A. South Allegheny High School.

* * *

[32] A. They do different, boat and barge repair.

Q. How are the barges moved in that facility? A. They are moved by the Motor Vessel Elizabeth on one side to the other.

Q. And who is the usual pilot or captain of the Motor Vessel Elizabeth? A. When the accident occurred it was myself and George Newman.

Q. Was the deck hand? A. Yes, sir.

Q. Take a look, please, at what is marked as Plaintiff's Exhibit 2. Can you tell us what that is? A. Yes. That is a picture of the Motor Vessel Elizabeth.

Q. Does it show the Elizabeth, Mr. Stinson, as it appeared back in April 27, '89 A. Generally, yes, sir.

MR. HAMMER: We offer 2, Your Honor, and ask leave to show it to the jury and have Mr. Stinson explain some of the features.

THE COURT: Any objection?

MR. MILLER: No objection, Your Honor

THE COURT: Admitted.

Q. Mr. Stinson, let me come up there with you. Where do you as the pilot when you're operating the Elizabeth

* * *

[60] A. The side towards all the other barges port side.

Q. Port side? A. Yes, sir.

Q. And do you know what he was going to do then? A. He was going to tie the half head line which was what general practice was back then, tie the barge at the half head.

Q. Does Picture No. 1 show the half head? A. Yes, sir.

Q. And is that the head with the piece of rope hanging down there? A. Yes, sir.

Q. Tell us what you saw. A. Well, I can't remember exactly if George carried line with him from the other end deck or if there was one already on the barge that we were tying beside it, the half head.

Q. So you don't remember if he was walking down the gunnel carrying a line? A. Or if there was one already at the other half head. That was the general practice back then.

Q. Okay. So tell us what you observed, please. A. I can remember George starting the figure eight. What I remember before that I asked George, Do you want me to back it down, because I noticed the timberheads weren't [61] even. And usually our general practice was we will back the boat down the barge to try to line them up. He said, No. They are going to line up the way the other barges are tied. Just keep working. I remember him starting to try the half head line. I can't remember I said before whether I looked up the hill because the train made a noise or if I was making the mass head. I don't remember exactly, but I remember the noise, looking up the hill for a little bit. When I looked back I seen George going back in the air. Looked like something was playing tug of war with him. Had the line in his hand falling backwards into the hopper barge.

Q. What did you do then? A. Well, after—first you're in shock. I couldn't understand what happened. We have done this a thousand times before. So at first I was concerned with George. I ran out of the pilot house, ran up on the barge beside George, where George was down in, yelled down to see if he was still—

Q. So you're up on the gunnel beside him, up here on the gunnel? A. Yes, sir.

Q. And he is down in? A. Yes, sir.

Q. Okay. At that time, Mr. Stinson, I know you

* * *

[368] doctor. Thank you.

MR. HAMMER: For the record, Your Honor, that testimony was given on May 17, 1991.

THE COURT: Thank you.

MR. HAMMER: Do you wish to take your break?

THE COURT: Do you have another live witness?

MR. HAMMER: Yes.

THE COURT: All right. We will take a short break.

(Whereupon, a brief recess was taken.)

THE COURT: Mr. Hammer, Your next witness.

MR. HAMMER: Your Honor, I would like to call Mr. Newman now, please.

THE COURT: Okay.

GEORGE THOMAS NEWMAN

having been first duly cautioned and sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAMMER:

Q. Give us your full name, please. A. George Thomas Newman.

Q. And Mr. Newman, what is your home address? [369] A. 324 Water Street, North Charleroi.

Q. Are you frightened? A. Beg your pardon?

Q. Are you frightened? A. I'm a little bit nervous and concerned, yes.

Q. How old are you? A. 48 and a half.

Q. Since the accident of April 27, 1989, how has your memory been? A. Not been real good.

Q. What is the last thing you remember that day? A. The day of the accident?

Q. Yes, sir. A. I'm not real, real sure about the last thing that I remember that happened that day, but I can give you a sequence of events. What I did is get up in the morning approximately 5:30, 6:00 in the morning. Get dressed; go downstairs. You know, the usual thing, brush your teeth, make a pot of coffee. I guess the last thing that I remember that morning was getting a cup of coffee and getting in my truck and going to work.

Q. When is the next thing you remember? Where were you? A. The next thing I remember wasn't that day obviously, but it was laying in Allegheny General Hospital I

* * *

CONSTITUTION

Constitution of the United States of America

ARTICLE VI.

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state Shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

AMENDMENT XIV

(Ratified July 9, 1868)

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

STATUTES

28 U.S.C.

§1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1954.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United

States Court of Appeals for the Federal circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title III, §302(a), 96 Stat. 55; Sept. 13, 1982, Pub.L. 97-258, §2(m)(1), 96 Stat. 1062; Jan. 12, 1983, Pub.L. 97-452, §2(d)(1), 96 Stat. 2478; Oct. 22, 1986, Pub.L. 99-514, Title XV, §1511(c)(17), 100 Stat. 2745.)

46 U.S.C. §688

* * *

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."[104]

---

[104]. 41 Stat. 1007 (1920); 46 U.S. CA. §688.

§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149 §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.)

§53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, §3, 35 Stat. 66.)

* * *

§54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, §4, 35 Stat. 66; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.)

§1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the Treaties or statutes of, or any commission held or authority exercised under, the United States.

* * *

RULE 238. DAMAGES FOR DELAY IN AN ACTION FOR BODILY INJURY, DEATH OR PROPERTY DAMAGE

(a)(1) At the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff in the verdict of a jury, in the decision of the court in a nonjury trial or in the award of arbitrators appointed under section 7361 of the Judicial Code, 42 Pa.C.S. §7361, and shall become part of the verdict, decision or award.

(2) Damages for delay shall be awarded for the period of time

(i) in an action commenced before August 1, 1989, from the date the plaintiff first filed a complaint or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision; or

(ii) in an action commenced on or after August 1, 1989, from a date one year after the date original process was first served in the action up to the date of the award, verdict or decision.

(3) Damages for delay shall be calculated at the rate equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus one percent, not compounded.

(b) The period of time for which damages for delay shall be calculated under subdivision (a)(2) shall exclude the period of time, if any,

(1) after which the defendant has made a written offer of

(i) settlement in a specified sum with prompt cash payment to the plaintiff, or

(ii) a structured settlement underwritten by a financially responsible entity,

and continued that offer in effect for at least ninety days or until commencement of trial, whichever first occurs, which offer was not accepted and the plaintiff did not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of either the specified sum or the actual cost of the structured settlement plus any cash payment to the plaintiff; or

(2) during which the plaintiff caused delay of the trial.

Note

This rule does not preclude the suspension of damages for delay as *pre-trial* sanction under Discovery Rule 4019.

In additional defendant proceedings, the additional defendant will be considered the defendant, for purposes of this subdivision, and the plaintiff will be considered either the original defendant if liability over is claimed, or the original plaintiff if direct liability is claimed, or both if both forms of liability are claimed.

(c) Not later than ten days after the verdict or notice of the decision, the plaintiff may file a written motion requesting damages for delay and setting forth the computation.

(1) Within ten days after the motion is filed, the defendant may answer specifying the grounds for opposing the plaintiff's motion. The averments of the answer shall be deemed denied. If an issue of fact is raised, the court may, in its discretion, hold a hearing before entering an appropriate order.

* * *

(2) If the defendant does not oppose the motion, the court shall add the damages for delay to the verdict or decision.

(3)(i) If a motion for post-trial relief has been filed under Rule 227.1 and a motion for delay damages is opposed, a judgment may not be entered until all motions filed under Rule 227.1 and this rule have been decided.

(ii) If no motion for post-trial relief is filed within the ten-day period under Rule 227.1 but the defendant opposes the motion for delay damages, the plaintiff may enter judgment on the verdict or decision. Thereafter, upon deciding the motion for damages for delay, the court shall enter judgment for the amount of the delay damages, if any.

(d)(1) In any action heard by a board of arbitrators in which damages for delay are requested, at least twenty days prior to the hearing the plaintiff shall notify the defendant of the intention to request delay damages and the date from which they are to be calculated. A defendant who objects to the request shall submit to the plaintiff within ten days prior to the hearing a statement setting forth the objections and whether

(i) the defendant made an offer in writing and, if so, the amount and the date of the offer; and

(ii) there was a period of time during which delay of the arbitration hearing was attributable to the plaintiff.

Each party shall submit to the board at the hearing a sealed envelope containing the plaintiff's request and the defendant's statement. Immediately upon making an award, the board of arbitrators shall review the contents of the envelopes and add damages for delay, if any, to the award. If the defendant opposes the request, the board may hold a hearing on the issue of damages for

delay and shall immediately thereafter determine the amount of damages for delay, if any. Damages for delay shall be separately stated in the report and award of the arbitrators.

Note

This rule contemplates that the board of arbitrators will make its award immediately upon conclusion of the hearing and that it will then proceed to consider the issue of damages for delay.

(2) The damages for delay shall not be included in determining whether the amount in controversy is within the jurisdiction of the arbitrators.

(e) This rule shall not apply to

(1) eminent domain proceedings;

* * *

(2) actions in which damages for delay are allowable in absence of this rule.

* * *

Supreme Court, U.S.
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No. 95-240

IN THE

Supreme Court of the United States

October Term, 1995

GEORGE NEWMAN,
Petitioner,

vs.

CONSOLIDATION COAL COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. IN THE MARITIME PERSONAL INJURY ACTION TRIED TO A JURY, IS A SEAMAN-PLAINTIFF ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST WHERE HE HAS FAILED TO REQUEST THAT THE JURY MAKE SUCH AN AWARD?

II. DID THE TRIAL COURT ERR IN DENYING THE SEAMAN-PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WITH REGARD TO THE SEAMAN-PLAINTIFF'S CONTRIBUTORY NEGLIGENCE?

RESPONDENT'S RULE 29.1 STATEMENT

There are no subsidiaries which are not wholly owned by Consolidation Coal Company. The following are parent companies of Consolidation Coal Company:

Rheinbraun US GmbH

Rheinbraun AG

RWE AG

DuPont Energy Company

E.I. du Pont de Nemours and Company

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Consolidation Coal Company ("Consol") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Pennsylvania Supreme Court's denial of Petitioner's petition to that court for leave to appeal the judgment and opinion of the Superior Court of Pennsylvania entered on August 31, 1994 at Nos. 2032 PGH 92 and 2033 PGH 92.

STATEMENT OF THE CASE

Petitioner, George Newman, initiated the present action by filing a Complaint at G.D. No. 90-0980 in the Court of Common Pleas of Allegheny County, Pennsylvania, on or about January 17, 1990 against his employer, Respondent, Consolidation Coal Company ("Consol"), seeking recovery for personal injuries under the Jones Act, 46 U.S.C. § 688, *et seq.* (Pet. p. a43) and general maritime law.

A jury trial was held from November 15, 1991 through November 25, 1991. At trial, Petitioner contended that on April 27, 1989, while working on the Monongahela River in Pennsylvania aboard the M.V. Elizabeth and on coal barge no. 1029, he fell into the empty barge when a rope that he was using to tie together certain barges (known as a "leaving line") broke. Petitioner claims that as a result of this fall, he sustained injury.

As noted by the trial court and Pennsylvania Superior Court, Consol established, through numerous witnesses, that it was Petitioner's responsibility as a deckhand to inspect the leaving lines that he was working with for signs of wear and defects. *See* Pet. pp. a25, a28 (trial court) and a13-a14 (Superior Court). While Petitioner was the only witness to deny that it was his responsibility to inspect the leaving lines, his practices as a deckhand, brought out through his own testimony, indicate that he in fact undertook that duty. *See Id.*

The jury returned a verdict for Petitioner on both the Jones Act negligence and unseaworthiness counts and found damages in the amount of $1,327,000. The jury also found that Petitioner was 11.83% contributorily negligent. On November 16, 1992, the trial judge molded the verdict to reflect the 11.83% contributory negligence and awarded Petitioner "delay damages" under Pa.R.Civ.P. 238 (Pet. p. a47) in an amount of $107,190.40 in response to his Motion for Prejudgment Interest (Pet. p. a16).

Both parties filed post-trial motions, Consol challenging, *inter alia*, the trial court's award of Rule 238 delay damages, and Petitioner seeking judgment notwithstanding the verdict on the jury's finding of contributory negligence. The trial court denied both parties' motions. Subsequently, both parties took appeals from the trial court's judgment to the Pennsylvania Superior Court.

That court, *inter alia*, reversed the trial court's award of delay damages pursuant to Pa.R.Civ.P. 238 and ruled that the Petitioner had waived his right to prejudgment interest by not having the issue presented to the jury. Pet. p. a12-a13. The Superior Court also affirmed the trial court's denial of Petitioner's Motion for Judgment Notwithstanding the Verdict. Pet. p. a14. Both parties sought discretionary review by the Pennsylvania Supreme Court, which review was denied on May 11, 1995.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The decision of the Pennsylvania Superior Court that Petitioner waived his right to prejudgment interest by not submitting that issue to the jury, which decision was refused appellate review by the Pennsylvania Supreme Court, is consistent with all other reported federal appellate decisions where the courts have addressed the issue. Because there is no conflict between the Pennsylvania state court decision and those of any other federal appellate courts where this issue has been raised, there is no basis for granting the writ.

The decision of the Pennsylvania Superior Court in the present action was based upon the same court's reported decision in *Musumeci v. Penn's Landing Corp.*, 433 Pa. Super. 146, 640 A.2d 416 (1994) which decision, in turn, was based on several decisions of United States Courts of Appeals. *See Musumeci*, 433 Pa. Super. at 156, 640 A.2d at 421.

Petitioner bases his request for certiorari on the issue of prejudgment interest on a purported "division[]" (Pet. p. 15) between the decision of the Pennsylvania Superior Court and other United States circuit courts of appeals, as well as a departure from the reasoning of decisions handed down by the United States Supreme Court. In fact, according to the Rules of the United

States Supreme Court, certiorari should only be granted "when there are special and important reasons therefor." S.Ct.R. 10.1. One such reason is where "a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." *Id.* at 10.1(b).

However, the decision of the Pennsylvania Superior Court is consistent with the opinions of federal courts of appeals which have addressed the issue of prejudgment interest that has not been submitted to a jury. All cases cited by petitioner in support of his position are factually inapposite or involve situations where the relevant court was not asked to address whether the issue of prejudgment interest must be put to a jury.

First, Petitioner cites *City of Milwaukee v. Cement Division, National Gypsum Company*, ___ U.S. ___, 115 S.Ct. 2091 (1995), wherein the Court applied the well-settled principle that "in maritime collision cases", prejudgment interest should be awarded unless peculiar or exceptional circumstances militate otherwise. *Id.* ___ U.S. at ___, 115 S. Ct. at 2095 (emphasis added).

The present action involves personal injury to a seaman asserting claims under the Jones Act, 46 U.S.C. § 688 (*see* Pet. p. a43). The case does not involve the collision of one or more vessels as set forth in *City of Milwaukee*.

More importantly, the *City of Milwaukee* case was heard pursuant to the district court's admiralty jurisdiction, *Id.*, ___ U.S. at ___, 115 S.Ct. at 2093, which jurisdiction generally does not provide for a trial by jury. *See Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475 (9th Cir. 1994), *citing Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847). *See also*, *Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986), *Penton v. Pompano Construction Co., Inc.*, 976 F.2d 636 (11th Cir. 1992). Thus, the United States Supreme Court had no opportunity, either expressly or implicitly, to address the issue of whether the right to prejudgment interest is waived when that issue is not submitted to the jury.

Petitioner cites several decisions from courts of appeals of various circuits where, in cases tried to a jury, the court awarded prejudgment interest to the plaintiff. *See* Pet. p. 11, n. 5. In none of these cases, however, was the court of appeals presented with the issue of whether the plaintiff's failure to have the issue of prejudgment interest presented to the jury constituted a waiver which could not be corrected by an award by the court. In *Snyder v Whittaker*, 839 F.2d 1085 (5th Cir. 1988), *Stissi v. Interstate and Ocean Transport Company of Philadelphia*, 765 F.2d 370 (2d Cir. 1985), *cited* by Petitioner, the respective courts of appeals devoted no discussion to the issue presented in this case. In *M&O Marine, Inc. v. Marquette Company*, 730 F.2d 133, 136 (3d Cir. 1984), the defendant merely contested the interest rate applied by the court, and not whether the court had any authority to decide such an award. In *Magee v. U.S. Lines*, 976 F.2d 821 (2d Cir. 1992), the

parties stipulated that the district court would decide the issue of the plaintiff's entitlement to and amount of prejudgment interest. Finally, in *McCormack v. Noble Drilling Corp.*, 608 F.2d 169, 175 (5th Cir. 1979), and *Columbia Brick Works, Inc. v. Royal Ins. Company of America*, 768 F.2d 1066, 1068 (9th Cir. 1985), the defendants therein conceded that the court could award plaintiff prejudgment interest.

In juxtaposition with the cases cited by Petitioner for the proposition that a conflict exists as to whether the court may award prejudgment interest in an maritime case tried to a jury, "[e]very other circuit that has considered the issue has held that where a maritime claim is tried before a jury, the amount of prejudgment interest must be submitted to the jury." *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1505 (9th Cir. 1995). Failure to so submit the issue to the jury results in a waiver of any entitlement to prejudgment interest. *Id. See also Petersen v. Chesapeake & Ohio Railway Company*, 784 F.2d 732, 740 (6th Cir. 1986); *Havis v. Petroleum Helicopters, Inc.* 664 F.2d 54, 55 (5th Cir. 1981); *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1361 (5th Cir. 1987); *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973); *Newburgh Land & Dock Company v. Texas Company*, 227 F.2d 732, 735 (2d Cir. 1955).

The very courts that Petitioner states have allowed the court to award prejudgment interest where the issue could have been decided by the jury are the very same courts which have, when expressly deciding the issue at hand, held that failure to so submit the issue to the jury

results in waiver. *Compare Snyder* with *Havis* and *Garijak* (5th Circuit). *Compare also, Interstate and Ocean Transport Company* with *Newburg Land and Dock Company* (2d Circuit); *Columbia Brick Works Inc.* and *Glynn* (9th Circuit).

Petitioner also cites the United States Supreme Court decision in *Sea-Land Services, Inc. v. Gaudet*, 414 US. 573 (1974) as supporting his position that the issue of prejudgment interest, even though not submitted to a jury, should be awarded in favor of Petitioner. Petitioner's reliance on this case, however, is truly baffling. The decision makes no mention of prejudgment interest; but instead addresses the award of loss of support, services, society and funeral expenses in a maritime wrongful death action. *Sea-Land Services* bears no relevance to the present action.

Finally, there exists yet another basis for denial of prejudgment interest in this case, although such basis was not relied upon by the Pennsylvania Superior Court. Specifically, the verdict encompasses both past and future damages. It is established that prejudgment interest, even where appropriate, may not be awarded on future damages. *Brister v. A.W.I., Inc.*, 946 F.2d 350, 362 (5th Cir. 1991). Petitioner acknowledges that his damage award includes those damages to be incurred in the future. *See* Pet. p. 14. He also acknowledges that the jury did not apportion Petitioner's damages sustained as opposed to those to be sustained. *Id.* Where a party is awarded both past and future damages, yet fails to request from the jury a segregation of that award, he has waived

his right to prejudgment interest on any portion of the award. *Coats v. Pennrod Drilling Corp.*, 5 F.3d 877, 891 (5th Cir. 1993); *Brister*, 946 F.2d at 362.

Petitioner does not contend that a conflict exists between circuits on this proposition. Instead, he claims that since the "verdict was reduced to present worth at the trial court's direction[,]" the distinction between past and future damages has been eliminated. *See* Pet. p. 14. This contention is economically absurd as the calculation of the present worth of future lost wages does not somehow magically change these future lost wages into damages for past lost wages.

Awards for lost future wages are to be discounted to present value, *Jones & Loughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), and thus, the authority cited above was rendered in light of this proposition. Further, awarding Petitioner prejudgment interest on damages which he will incur in the future would amount in a double recovery. Petitioner may earn interest on his damage award merely by depositing said sum in interest-bearing vehicles. To award Petitioner interest on top of that which he could otherwise earn would countenance the accrual of interest twice.

II. Petitioner's challenge to the Pennsylvania courts' refusal of his Motion for Judgment Notwithstanding the Verdict, and affirmance thereof, raises questions of sufficiency of the evidence presented at trial on the issue of Petitioner's contributory negligence, which issues should summarily be denied review by this Court.

Under the guise of a claimed abridgement of Petitioner's federal rights and a departure from decisions of the United States Supreme Court and United States Courts of Appeals, Petitioner contends that the Pennsylvania courts erred in denying his Motion for Judgment Notwithstanding the Verdict on the issue of his contributory negligence (Pet. p. a28) and affirming that denial (Pet. pp. a13-a14).

Quite simply, the appropriate question is whether Consol presented sufficient evidence to have the jury find that Petitioner was contributorily negligent in causing his own injuries.

A seaman's recovery under either the Jones Act or the doctrine of unseaworthiness under the general maritime law may be reduced by the proportion to which his contributory negligence caused his injuries. *See Seas Shipping Company v. Sieracki*, 328 U.S. 85, 94, n. 11 (1946); *Beadle v. Spencer*, 298 U.S. 124, 131 (1936). As indicated by Petitioner's argument on this issue (Pet. pp. 16-19), review of the Pennsylvania courts' decisions is imminently fact-intensive. Such factual issues include

whether Petitioner had a duty to inspect the leaving line which allegedly broke, whether he complied with that duty, whether there was a basis for him to anticipate the dangers that allegedly caused his injuries, as well as the credibility of several witnesses, including Petitioner himself. As noted above, certiorari should be granted only where important reasons command such review. S.Ct.R. 10.1. Issues lack sufficient importance where the Supreme Court is required to analyze particular facts of the case. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Appellate review of the trial court's denial of Petitioner's Motion for Judgment Notwithstanding the Verdict must be undertaken such that the evidence is viewed in the light most favorable to the verdict winner, *i.e.*, Consol; "[e]vidence supporting the verdict is considered and the rest rejected. Conflicts in testimony are resolved in favor of the verdict winner." *Glass v. Freeman*, 430 Pa. 21, 24, 240 A.2d 825, 827 (1968) (emphasis added).[1] In light of this standard which gives the trial judge limited authority to alter the verdict of the jury on the issue of contributory negligence, the Pennsylvania courts found

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[1] In Federal Courts, the standard for overturning a jury's findings is similarly stringent. *See, e.g., Sorlucco v. New York City Police Department*, 971 F.2d 864, 871 (2d Cir. 1992) ("[J]udgment n.o.v. is reserved for those rare occasions when there is such a complete absence of evidence supporting the verdict that the jury's finding could only have been the result o[f] sheer surmise and conjecture or the evidence must be so overwhelming that reasonable and fair minded persons could only have reached the opposite result.")

that Consol had presented ample evidence to show that Petitioner had a duty to inspect the leaving line which allegedly broke, and that the failure of Petitioner to do so was the proximate cause of his injuries. *See* Pet. pp. a25, a28 (trial court), a13-a14 (Superior Court). Petitioner's own testimony concerning his actions belies contention that he had no duty to inspect the line which allegedly broke. Pet. p. a14.

As a review of the propriety of Pennsylvania courts' denial and upholding of that denial of Petitioner's Motion for Judgment Notwithstanding the Verdict entails an inquiry into the facts of this case, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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